State Advisory Board on Air Pollution

Subcommittee Report

Public Information vs CBI

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Prepared at the request of the

Virginia State Air Pollution Control Board

by the

State Advisory Board on Air Pollution

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Table of Contents

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Public Information vs CBI

This report considers the issues involved in responding to Virginia Freedom of Information Act (VFOIA) requests for information that a company has claimed to be Confidential Business Information (CBI). We reviewed current and proposed laws and regulations concerning VFOIA and CBI. We also reviewed the current practices at Virginia Department of Environmental Quality (VDEQ) regional offices involving VFOIA requests, collection of CBI during permitting and compliance evaluations, and routine management of CBI records, especially as pertains to air permits. It is obvious that there must be a balance between the public to be reasonably informed about the operations of a company related to the emission of regulated pollutants and the company's right to protect confidential business information. Conflicts between a company and a VFOIA requester concerning CBI claims often create ill will between all parties including the VDEQ and its personnel. These cases also consume valuable time and resources.

In this report, we provide recommendations to facilitate the establishment of guidance criteria for the collection and management of CBI. The purpose of this report is not intended to set policy and the recommendations within this report are limited to Virginia Air Statutes and Regulations and Policies. A regulated company may find it necessary to disclose CBI during the permit application process and subsequently during compliance inspections and in providing required reports. We examined ways to diminish the conflict between VFOIA requests and CBI claims. This begins with the proper

education of the public, the regulated company and the VDEQ personnel regarding the laws, regulations and policies concerning CBI and VFOIA.

Attachment A contains a detailed review and discussion of the Freedom of Information Act and the Trade Secret Exemption. We provide a practical list of "Frequently Asked Questions" as **Attachment B** to this report to serve to instruct and inform business, requesters and the VDEQ as to their legal rights and responsibilities. A company may take steps from the outset to protect information it considers confidential. The FAQs in **Attachment B** identify what may and may not be considered CBI. Emissions data is clearly excluded, as is any information that can be demonstrated to be available to the public through other means. As part of this report preparation, we performed an informal survey of current practice in the DEQ Regional Offices and found a variable approach to dealing with CBI issues and VFOIA requests. As such, the FAQ Sheets do not necessarily reflect current practices within each DEQ Regional Office. We suggest that the FAQ Sheets be updated frequently by the DEQ staff based on their experience in CBI issues and VFOIA requests.

VFOIA applies to all public records and information unless specifically excluded. We recommend that a proactive approach be taken to decide which information may be excluded as CBI prior to any requests under VFOIA. While this does not preclude contested VFOIA requests being decided in court, it should result in more adequate precautions to protect CBI and lessen the number of instances where CBI claims are contested.

The VDEQ has the responsibility to protect CBI contained in its files. This includes all information submitted containing CBI identified by the company. Separate

filing systems for public and confidential files should be maintained. Adequate precautions should be established to safeguard the integrity of confidential files. **Attachment C** contains a set of recommendations for managing these confidential files.

A more difficult issue involves information generated internally within the VDEQ in the form of analyses, memoranda, etc resulting from permit reviews, compliance inspections, enforcement actions and other activities that may contain CBI. Steps to evaluate these documents and safeguard CBI are also contained in **Attachment C**.

Specific Findings and Recommendations

1. We find the main difference between the EPA Regulations and the State Regulations concerning CBI and Trade Secrets is simply that the State Regulations do not outline any procedures designed to provide affected businesses with notice of a pending request for information under the VFOIA. As described in **Appendix A** of this report, such procedures provide insurance against liability by provoking injunctive lawsuits regarding information that may be entitled to confidential treatment before any public disclosures are made and any damage is done.

2. Therefore, we recommend that the VDEQ provide notice to all companies submitting information to the Board that they may assert business confidentiality claims and asking them to accompany any such claim with an explanation of why the information qualifies for the exemption. While the current regulations provide that such a claim is required to obtain confidential status, no notice to businesses is required. Also, included in such notice should be a warning that if no confidentiality claim is made, the information may be disclosed without any further notice.

3. We further recommend that the VDEQ, upon receipt of a request under the VFOIA for information that is normally of the type that would be confidential **or** that is covered by a confidentiality claim, the Board should provide notice to any affected businesses stating either (a) the Board has denied the businesses' confidentiality claim and, therefore, plans to disclose the information at issue at the end of a specified number of days, or (b) that the Board has received a VFOIA request for the information and that the business is invited to comment within a specified number of days regarding the applicability of the exclusions under Sections 10.1-1314 and 10.1-1314.1.

4. In addition, we recommend that it would always be advisable to try to obtain the affected businesses' consent, possibly by limiting the scope of any disclosure or redacting certain portions of the disclosure, before making public any sensitive information. By adopting such procedures to provide notice to affected businesses, the Virginia Air Pollution Control Board could in most cases achieve a satisfactory settlement of all issues regarding the confidentiality of information (whether by judicial decree or otherwise) before any such disclosure was made, thereby eliminating any possibility of monetary liability.

5. We recommend that the VDEQ prepare and maintain a list of frequently asked questions (FAQs) regarding CBI, Trade Secrets and the Virginia Freedom of Information Act. We have provided as **Attachment B** to our report some typical questions and answers for businesses, information requestors and VDEQ staff.

6. We recommend that the FAQs be updated regularly based upon experience. They should be made readily available through the VDEQ web site and in hardcopy form.

7. Finally, we recommend that the VDEQ should provide at least as much protection for CBI as the companies which provide the CBI to the VDEQ (see **Attachment C**). In order to assess the measures necessary to adequately protect CBI, we recommended that Virginia State Air Pollution Control Board convene a special task force consisting of representatives of Virginia industry, DEQ staff and the Attorney General's office to assess the necessary elements of a management system for protecting CBI contained in DEQ files.

ATTACHMENT A

Freedom of Information Act – Trade Secret Exemption

This attachment serves to summarize the applicable provisions of the federal Freedom of Information Act ("FOIA"), the Virginia Freedom of Information Act ("VFOIA"), regulations promulgated by the Environmental Protection Agency regarding the FOIA ("EPA Regulations"), regulations promulgated by the State Air Pollution Control Board under the VFOIA ("State Regulations"), and any other applicable laws and regulations.

As shall be discussed below, the adoption of appropriate procedures for processing requests under the VFOIA, like the procedures outlined in the EPA Regulations, should eliminate any potential liability for the Commonwealth or state officials. Under such procedures, any business that could potentially be affected by the disclosure of information under the VFOIA would be notified of the appropriate state agency's intention to disclose sensitive information in advance of any such disclosure. As such, the affected business would have ample opportunity to determine whether it had a right to keep such information confidential before any damages accrued by instituting a suit to enjoin the agency from making a disclosure. By obtaining judicial review of all legal rights before any public disclosure, no properly protected trade secrets should ever be disclosed. Thus, there should never be any damages that could provide a basis for a liability claim.

In the material that follows, we will first discuss the federal laws and regulations relating to the FOIA. While the FOIA is not applicable to state agencies, it is very similar in purpose and

framework to the VFOIA and can provide a useful guide to an analysis of the VFOIA. Second, we will summarize the various state laws and regulations dealing with this issue.

I. FEDERAL LAW

A. The FOIA

The FOIA[1] was enacted in 1966 as a means of providing the voting public with more access to information about their government.[2] As such, there is a strong public policy underlying the FOIA in favor of making as much information available to the public as possible.

In enacting the FOIA, however, Congress recognized that there would have to be some exceptions to this general rule in favor of disclosure. Some information, such as trade secrets, is required by governmental agencies to properly monitor regulated industries, but disclosure of such information would be very detrimental to the businesses involved and could reduce the incentive to innovate. Thus, Congress created a number of exceptions to the FOIA, including exceptions for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[3]

This exception was specifically designed to allow a business to furnish government agencies with all required information without fear that such information could later be disclosed to its competitors or the public at large. Of course, the statutory exception raises a number of important questions such as (1) determining what "trade secrets" and "confidential" information are covered by the exception; and (2) determining how a private business can enforce the protections provided by the Section 552(b)(4) exception.

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1 5 U.S.C. Section 552 (2001).

2 *See* Paul M. Nick, *De Novo Review in Reverse Freedom of Information Act Suits*, 50 Ohio St. L. J. 1307 (1989).

3 5 U.S.C. Section 552(b)(4) (2001).

1. What are "trade secrets" and "confidential information" under the FOIA?

A number of federal cases have dealt in large part with the scope of the exception to the FOIA in Section 552(b)(4). The necessity of an exception for confidential commercial information was noted in the Senate Report: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained."[4]

The Section 552(b)(4) exception protects two distinct types of information: (1) "trade secrets" and (2) other confidential or financial information. While the use of "trade secret" has not received much attention from the courts, it is important to note that the term "trade secret" as used in the FOIA has been interpreted more narrowly than the interpretation given under the Restatement of Torts.[5]

If a trade secret is found to exist, the information is excepted from disclosure. If there is no trade secret, though, a further inquiry must be made to determine if the information qualifies as "commercial or financial information" of the type described in

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4 S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (cited in National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (1974)).

5 Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). In Public Health, an action was brought against the FDA to force it to disclose certain documents. In discussing the scope of the term "trade secret," the Court rejected using the broad definition found in the Restatement of Torts (a definition very similar to the one in Va. Code Ann. Section 59.1-336) and instead used a much narrower definition -- "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing or trade commodities and that can be said to be the end product of either innovation or substantial effort." Such a disconnect between the definition of "trade secret" under state law and the FOIA magnifies the potential that a "taking" could occur as discussed in Section I.A.2.b.

section 552(b)(4).[6] Perhaps because the definition of "trade secret" has been construed so narrowly, most of the case law has focused on this "confidential" information exception contained in Section 552(b)(4).

For a long period of time, the United States Appellate Court for the District of Columbia's decision in National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (1974), was the principal case in this field. In National Parks, the National Parks and Conservation Association brought an action to force the Department of the Interior to release agency records relating to concessions in the national parks. The Department of the Interior had refused on grounds that the records were confidential business information belonging to the concessioners. In rendering its decision, the Court outlined a two-prong test for determining whether information should be kept confidential under the FOIA. Information would be within the exception if either (1) disclosure would "impair the government's ability to obtain necessary information in the future"; or (2) disclosure would cause "substantial harm to the competitive position" of the business supplying the information.[7] Under the facts of the case, the Court determined that the business information was indeed protected from disclosure so long as the release of the information could have some detrimental impact on the concessioners' competitive position.

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6 Id.

7 National Parks, 498 F.2d at 770.

In 1992, however, the Court of Appeals for the District of Columbia decided Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992). In that case, Critical Mass Energy Project, a public interest organization, sought to force the Nuclear Regulatory Commission to release certain reports voluntarily given to the Commission by an industry group. In finding for the Commission that the reports were exempt from the FOIA, the court affirmed National Parks, but added another category of confidential information immune from disclosure under the FOIA for information that was voluntarily disclosed.[8]

These two cases provide the proper framework with which to analyze whether information should be kept confidential. Moreover, these decisions demonstrate that the purpose of the exception is two-fold: (1) it is meant to protect government employees from liability for failing to disclose confidential information; and (2) it is designed to provide businesses with some assurances that their sensitive information will be kept confidential.

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[8] Critical Mass, 975 F.2d at 880.

2. How can the Section 552(b)(4) exception be enforced?

a. Injunctive Remedies

Of course, without a proper enforcement mechanism, the fact that the information should not be disclosed under the FOIA does not mean that the information will not be disclosed. The FOIA, being a statute designed to promote disclosure of information to the public, only specifically provides a remedy for those citizens seeking to enjoin the government from withholding information (or seeking a writ of mandamus to force disclosure). Thus, under the statute, a party seeking disclosure of information wrongfully withheld could file suit and under some circumstances receive an award of attorneys' fees.[9]

Noticeably absent from the statute is any means by which a business could sue the government to prevent disclosure of information. Indeed, current law is that the FOIA, alone, does not provide any private right of action for parties seeking to prevent disclosure.[10]

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9 *See* 37A AM. JUR. 2D Sections 592-598 (2001) (before awarding attorney fees, most courts require (1) a benefit to the public from disclosure and (2) that the withholding agency had no reasonable basis for believing it could withhold the information at issue).

10 Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

While the FOIA does not hold any remedies for such businesses, the Administrative Procedure Act does provide for judicial review of final agency decisions.[11] A number of cases have held that an injunctive suit under the Administrative Procedure Act is a proper method of preventing disclosure of confidential information under the FOIA (so-called "reverse FOIA" suit).[12] These reverse FOIA suits have been the sole mechanism by which businesses have sought to enforce their rights under the FOIA to have sensitive business information kept confidential.

b. Monetary Remedies

None of the remedies discussed above involves any monetary liability for government officials due to wrongful disclosures. Indeed, due to procedures implemented by the EPA and other agencies, the remedies discussed above are almost certain to be sufficient. It is possible however, that monetary liability could attach to either a government official or the government in one of two distinct situations.

First, it could be possible that a government employee maliciously and wrongfully makes a disclosure of confidential business information that should not have been disclosed under the FOIA. Note that mere negligence or a mere mistake would likely not be sufficient because the employee would likely enjoy immunity for

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11 Id.

12 *See* Environmental Technology, Inc. v. U.S. E.P.A., 822 F.Supp.1226, 1228 (1993) (affirming Chrysler).

such actions in his official capacity.[13] In these extreme circumstances where his actions are malicious, the employee would lose his immunity and, therefore, be subject to an action for misappropriation of trade secrets under state law.[14] In addition, such an employee could face criminal sanctions under the Trade Secrets Act.[15]

The second scenario where a business might obtain money damages would be where an employee discloses information under the FOIA (whether properly or improperly) that is considered a trade secret for state law purposes. In such a case, the disclosure of information would not result in personal liability of the official, but could raise the issue of whether a "taking" had occurred under the Fifth Amendment.[16] Thus, it is possible that a government employee could trigger a "taking" by negligently or mistakenly disclosing confidential information that should rightfully have been protected under Section 552(b)(4). There are no cases establishing such a cause of action, but due to the Ruckelshaus v. Monsanto decision, such an interpretation of the Takings Clause is entirely possible. If a taking were to occur, the federal government

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13 28 U.S.C. Section 2680(a) (2001).

14 *See infra* Part II.A.2.b. for a discussion of the Virginia Uniform Trade Secrets Act.

15 18 U.S.C. Section 1905 (2001).

16 Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). In Ruckelshaus, the issue was whether disclosure of information under Federal Insecticide, Fungicide, and Rodenticide Act (which contains language comparable to that in the Section 552(b)(4) exception under the FOIA) constituted a Fifth Amendment Taking. The Court found that such disclosure was a taking because(1) the trade secret information was recognized as property under state law and (2) Monsanto had reasonable, investment-backed expectations of confidentiality in the information due to assurances of confidentiality by the EPA.

(not the employee) could be found liable for a monetary claim under the Tucker Act.[17]

B. EPA Regulations

In order to alleviate some of the uncertainty regarding the FOIA, the Environmental Protection Agency ("EPA") adopted a number of regulations to help define what would be treated as confidential and to outline the procedures used to help protect confidential information.

To help the EPA identify information that a company may wish to keep confidential, the EPA is required to supply notice to all businesses submitting information which could be confidential.[18] This notice is required to include the following: (1) a statement informing the business that it may "assert a business confidentiality claim" when it supplies the necessary information; and (2) a statement that if no such confidentiality claim is made, the information may be made public without further notice to the company.[19]

If the business fails to make a confidentiality claim, the EPA is not under any duty to make any further inquiries with the company.[20] As a practical matter, though, even if no such claim is made, the EPA will contact a company if the information sought

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17 28 U.S.C. Section 1491 (2001).

18 40 C.F.R. Section 2.203(a) (2001).

19 Id.

20 40 C.F.R. Section 2.203(c) (2001).

under the FOIA is of the type that a business would normally be expected to assert a confidentiality claim.[21] The business is also permitted to make a confidentiality claim after the information is filed with the EPA, but this claim is ineffective as to any public disclosure of the information prior to the receipt of the claim.[22]

Upon receipt of a request for information covered by a confidentiality claim, the EPA will make an initial determination as to whether the information *may* be entitled to protection.[23] If it is clearly outside the scope of the confidential business information exception, the EPA will provide the affected business with notice that confidential treatment has been denied.[24] If the information is even arguably eligible for confidential treatment, however, the EPA will allow the business to comment regarding the applicability of the exception.[25] Of course, having such notice prior to public disclosure also gives the business an opportunity to enjoin the disclosure of the confidential information before it is made public. Predictably, injunctive suits have become the method by which Section 552(b)(4) issues are litigated.

By using such procedures, federal agencies like the EPA have avoided potential

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21 40 C.F.R. Section 2.204(c)(2) (2001).

22 40 C.F.R. Section 2.203(c) (2001).

23 40 C.F.R. Section 2.204(d) (2001).

24 40 C.F.R. Section 2.205(f) (2001).

25 40 C.F.R. Section 2.205(b) (2001).

liability problems. Reverse FOIA suits allow the legality of any disclosure to be judicially determined before any disclosure is actually made. Thus, any question as to whether the information fits within the exception is predetermined, and the EPA is then able to act in full compliance with the FOIA.

II. VIRGINIA LAW

A. The VFOIA

In 1968, the Commonwealth of Virginia enacted the VFOIA,[26] which, like the FOIA, required public bodies in Virginia to make certain information available to the public. Again like the United States Congress, the General Assembly recognized that some information should be kept confidential and created an exclusion from the disclosure requirements wherever "specifically provided by law."[27]

One instance in which the General Assembly specifically excluded information from disclosure to the public was in the Code provisions creating the Air Pollution Control Board. Under Virginia Code Section 10.1-1314, "[a]ny information, except emission data, as to secret processes, formulae or methods of manufacture or production shall not be disclosed in public hearing and shall be kept confidential." Moreover, Virginia Code Section 10.1-1314.1 provides as follows:

> "Any information, except emissions data, reported to or otherwise obtained by the Director, the Board, or the agents or employees of either which contains or might reveal a trade secret shall be confidential and shall be limited to those persons who need such information for purposes of enforcement of this chapter or the federal Clean Air Act or regulations and orders of the Board. It shall be the duty of each owner to notify the Director or his representative of the existence of trade secrets when he desires the protection provided herein."

Again, though, the existence of these exclusions merely begs the question of what should be

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26 Va. Code Ann. Section 2.1-342 (2001).

27 Id.

included within these exclusions and how can the affected business enforce any rights it might have under the exclusion.

1. What are Trade Secrets under Virginia Law?

The term "trade secret" is not defined under either the VFOIA or Virginia Code Section 10.1-1314.1. The Uniform Trade Secrets Act, however, defines a trade secret as:

> "information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:
> 1. Derives independent economic value, actual or potential, from not being generally know to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
> 2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[28]

Thus, presumably all information falling under this definition is immune from disclosure under the VFOIA.

2. What remedies are available for businesses?

a. Injunctive Remedies

The remedies available under the VFOIA are similar to those available under its federal counterpart. Again, the statute explicitly provides a private right of action for parties seeking to enjoin the government from withholding information.[29] Under the VFOIA, unlike the FOIA, an award of reasonable attorneys' fees is **mandatory** if the

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28 Virginia Code Ann. Section 59.1-336 (2001). Note that this definition is much broader than the definition in Public Citizen Health, as discussed *supra* Note 5.

29 Virginia Code Ann. Section 2.1-346(A) (2001).

party seeking to enforce his rights under the VFOIA substantially prevails on the merits.[30] There may also be an additional civil penalty applying to state officials for any willful or knowing violation of the VFOIA.[31]

Presumably, these remedies are also available to businesses seeking to enjoin a disclosure because the remedies were made applicable to the entire VFOIA,[32] but Virginia has no precedent on the issue. At the very least, any decisions to disclose information would be reviewable under the Virginia Administrative Process Act.[33]

b. Monetary Remedies

In addition to the civil penalties under Virginia Code Section 2.1-346.1, state employees could be liable under the Uniform Trade Secrets Act. That act allows for injunctions and damages for misappropriation of trade secrets. "Misappropriation," in turn, is defined as "[d]isclosure of a trade secret of another with out express *or implied* consent by a person who . . . [a]t the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was . . . [a]cquired under circumstances

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30 Virginia Code Ann. Section 2.1-346(D) (2001). *See* Redinger v. Casteen, 13 Cir. LX29081A (1995) (emphasizing the differences between the federal and state standards).

31 Virginia Code Ann. Section 2.1-346.1 (2001) (providing for a fine of not less than $100 or more than $1,000 for the first violation and no less than $500 or more than $2,500 for subsequent violations).

32 Virginia Code Ann. Section 2.1-346 (2001). Unlike its federal counterpart, the remedies under the VFOIA are not specifically limited to those seeking to force disclosure of information. Instead they are made generally applicable to anyone seeking to enforce his rights under the VFOIA.

33 Virginia Code Ann. Section 9-6.14:17 (2001).

giving rise to a duty to maintain its secrecy or limit its use."[emphasis added][34]

It would be rare, however, that any employee could ever be found liable under this statute absent extraordinary factual circumstances. First, so long as the disclosure is made in accordance with the VFOIA, an argument could be made that the business supplying the information had given its implied consent for that information to be made public in accordance with the VFOIA.

Second, even if the employee negligently disclosed the information in violation of the VFOIA, the state employees making decisions regarding whether to disclose business information would be protected from personal liability by sovereign immunity.[35] There would only be the potential for personal liability under the Uniform Trade Secrets Act if the employee's conduct constituted either gross negligence or an intentional violation of the VFOIA.

The final avenue by which there could be liability for the disclosure of a trade secret would be under "takings" law. As discussed in connection with the federal laws above, such an action would be against the Commonwealth and not against the individual employee and could provide a remedy for situations where confidential information or a trade secret is wrongfully disclosed to the public.

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34 Virginia Code Ann. Section 59.1-336 (2001).

35 *See* Messina v. Burden, 228 Va. 301 (1984). The Court in Messina decided two separate cases, both dealing with personal injury actions against state employees for injuries sustained on state property. In deciding whether sovereign immunity extended to these state employees, the Court laid out a four-factor test: "(1) the nature of the function performed by the employee; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and direction exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion." In both cases, the employees were held to qualify for sovereign immunity and as such were not liable for their acts of mere negligence.

B. Air Pollution Control Board Regulations

Like the EPA, the Air Pollution Control Board developed regulations to help define what types of information would be considered confidential.[36] Specifically, the Air Pollution Control Board requires any business seeking confidentiality to supply a certificate containing the following: (1) a statement that the business has and will continue to take measures to protect the confidentiality of the information; (2) a statement that the information is not available to private citizens without permission of the company; (3) a statement that the information is not publicly available; and (4) a showing that disclosure of the information would cause substantial harm.[37]

One question these criteria raise is whether disclosed information loses its confidential status as a result of a submission of the same information to the EPA without an attached confidentiality claim. If the EPA actually disclosed the information at issue to the public, resolution of this issue would be academic since the information would be publicly available. Until the EPA does disclose the information, however, it should not be deemed to be publicly available because, as discussed above, the EPA allows businesses to submit confidentiality claims after the information is submitted.[38] Moreover, the EPA may contact the business to inquire as to whether confidentiality is desired even if there is no confidentiality claim at the time a request for information under the FOIA is received.[39] Thus, until the EPA actually makes the

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36 Va. Admin. Code Section 5-170-6

37 Id.

38 *See supra* Section I.B. for a discussion of EPA procedures.

39 Id.

disclosure, there is still a great possibility that the information at issue is not, and will not become, publicly available. So long as the proper measures are taken by the business at the state level, confidentiality should be protected.

The main difference between the EPA Regulations and the State Regulations is simply that the State Regulations do not outline any procedures designed to provide affected businesses with notice of a pending request for information under the VFOIA.[40] It is, therefore, much more likely that a disclosure could be made in violation of the VFOIA without having had any prior judicial determination as to the legality of that disclosure. While a state employee would still not be personally liable due to sovereign immunity, it is always possible that there could be a deemed taking under the Ruckelshaus v. Monsanto precedent, resulting in a monetary judgment against the Commonwealth.[41]

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40 Va. Admin. Code Section 5-170-6

41 *See supra* Section I.A.2.b.

III. CONCLUSION

For the above stated reasons, it is very unlikely that any state employee would ever be found personally liable for making any disclosure (or failing to make a disclosure) under the FOIA or the VFOIA. To even further reduce the potential for liability, the Virginia Air Pollution Control Board may wish to adopt procedures similar to those found in the EPA Regulations. As noted above, such procedures provide insurance against liability by provoking injunctive lawsuits regarding information that may be entitled to confidential treatment before any public disclosures are made and any damage is done.

Specifically, the Virginia Air Pollution Control Board may wish to adopt the following regulations to deal with information that may fall within the ambit of Sections 10.1-1314 and 10.1-1314.1:

(1) Provide notice to all companies submitting information to the Board that they may assert business confidentiality claims and asking them to accompany any such claim with an explanation of why the information qualifies for the exemption. While the current regulations provide that such a claim is required to obtain confidential status, no notice to businesses is required. Also, included in such notice should be a warning that if no confidentiality claim is made, the information may be disclosed without any further notice.

(2) Upon receipt of a request under the VFOIA for information that is normally of the type that would be confidential **or** that is covered by a confidentiality claim, the Board should provide notice to any affected businesses stating either (a) the Board has denied the businesses' confidentiality claim and, therefore, plans to disclose the information at issue at the end of a specified number of days, or (b) that the Board has received a VFOIA request for the information and that the business is invited to comment within a specified number of days regarding the applicability of the exclusions under Sections 10.1-1314 and 10.1-1314.1.

In addition, it would always be advisable to try to obtain the affected businesses' consent, possibly by limiting the scope of any disclosure or redacting certain portions of the disclosure, before making public any sensitive information. By adopting such procedures to provide notice to affected businesses, the Virginia Air Pollution Control Board could in most cases achieve a satisfactory settlement of all issues regarding the confidentiality of information (whether by judicial decree or otherwise) before any such disclosure was made, thereby eliminating any possibility of monetary liability.

REFERENCES

1. United States Department of Justice Office of Information and Privacy Web Page – A good resource for an explanation of various issues relating to the Freedom of Information Act.

   http://www.usdoj.gov/oip

2. Environmental Protection Agency Freedom of Information Office – Contains online copies of the Freedom of Information Act and the EPA's Regulations relating to the Freedom of Information Act.

   http://www.epa.gov/foia

3. Virginia Freedom of Information Advisory Council – Contains online copy of the Virginia Freedom of Information Act and an explanation of the provisions in the Act.

   http://dls.state.va.us/foiacouncil.htm

4. The Virginia Administrative Code – Contains an online copy of the State Air Pollution Control Board Regulations.

   http://leg1.state.va.us/000/reg/TOC09005.HTM

ATTACHMENT B

FREQUENTLY ASKED QUESTIONS REGARDING THE CONFIDENTIAL BUSINESS INFORMATION EXCEPTION TO VIRGINIA'S FREEDOM OF INFORMATION ACT

Background Information:

1. What is the Virginia Freedom of Information Act?

In 1968, the Commonwealth of Virginia enacted the Virginia Freedom of Information Act ("VFOIA") requiring state agencies to make certain information available to the public. The purpose of the Act was to allow the public to better monitor its elected officials and the activities of state agencies and employees. The official text of the VFOIA may be found in Sections 2.1-340, *et seq.*, of the Virginia Code.

2. What information is available under the VFOIA?

The VFOIA applies to *all* public records and information held by public bodies, unless otherwise excluded from the scope of the VFOIA by statute. Thus, all information held by the Virginia Department of Environmental Quality ("VDEQ"), if properly requested, must be provided to the requesting party unless there is some statutory justification for withholding some or all of it from public disclosure.

3. What types of information held by the VDEQ are excluded from the disclosure requirements?

The Virginia Code contains a number of exceptions to the disclosure requirements of the VFOIA, all of which prohibit the VDEQ's disclosure of any information to which they apply. The most important of these exceptions are those for confidential business information and trade secrets (collectively referred to as "Confidential Business Information"). The statutory basis for these exceptions can be found in Sections 10.1-1314 and 10.1-1314.1 of the Virginia Code.

4. What is Confidential Business Information?

Confidential Business Information in this context includes secret processes, formulae or methods of manufacture or production and trade secrets. Essentially, anything a business keeps confidential and uses to gain a competitive advantage over rival companies will be included. The

only type of information that is explicitly excluded by statute from the scope of Confidential Business Information is emissions data. Emissions data must always be disclosed by the VDEQ if it is properly requested under the VFOIA.

5. What is a trade secret?

The term "trade secret" is undefined for the purposes of the VFOIA disclosure exception. "Trade secrets" are, however, defined under the Uniform Trade Secrets Act, in Section 59.1-336, *et seq.* of the Virginia Code, as information (including formulas, patterns, compilations, programs, devices, methods, techniques, or processes) that (1) has economic value to the owner because it provides the owner with a competitive advantage over its rivals, and (2) is kept secret by the owner through use of reasonable precautions. The VDEQ uses this exact same definition of "trade secrets" in the instructions to the Form 805 Title V Air Operating Permit Application.

6. What are secret processes, formulae or methods of manufacture or production?

The Virginia Code does not clarify what types of information would fall within this category. In addition, no court cases have dealt with the scope of this exception under the VFOIA.

7. What are "emissions data"?

The term "emissions data" is not defined in the VFOIA, the State Air Pollution Control Law or the VDEQ's regulations. However, the VDEQ's VFOIA Compliance Policy, Policy Statement No. 1-2001 (Nov. 16, 2000), does define "emissions data". The VDEQ's VFOIA Policy states, in relevant part:

> In some instances the Code specifically requires that certain information always be made available to the public on request. Such information includes:
>
> a. "Emissions data" as provided in [Va. Code] §§ 10.1-1314 and 1314.1 means the information gathered by, or submitted to, VDEQ regarding the amount of pollutants emitted by sources of air pollution . . . .

8. What is the rationale for prohibiting the disclosure of Confidential Business Information?

The protections given to Confidential Business Information are the product of (1) the government's desire to encourage frank disclosure of information by businesses and (2) the need for businesses to keep trade secrets and other proprietary information confidential so as to realize some economic return on their investment in innovation and intellectual property.

It is important to remember that any information made public is available not only to those who are concerned about enforcement of environmental laws, but also to any business that competes with the reporting company. Any Confidential Business Information that is disclosed to the public will immediately be available to rivals of the reporting company and eliminate any competitive advantage or economic value derived from that information.

If all information reported to the VDEQ were made publicly accessible, businesses would either try to hide information from the VDEQ or sharply decrease their investment in developing economically valuable Confidential Business Information. Without shielding such information from public disclosure, then, Virginia would sacrifice either cooperation of regulated entities or technological innovation that spurs economic growth. Either consequence would impose a high cost on Virginia. To minimize these costs, the General Assembly adopted the Confidential Business Information exclusion.

Frequently Asked Questions by Businesses Submitting Confidential Information to the VDEQ:

9. Should Confidential Business Information be submitted to the VDEQ?

Generally, it is a good idea to only submit that Confidential Business Information that is absolutely required to be disclosed to the VDEQ. Common sense would dictate that if fewer people know your Confidential Business Information, it is less likely to be leaked to your competitors.

Of course, businesses should not impede the regulatory process by withholding any information that must, by law, be disclosed to the VDEQ. Rather, businesses should simply review any documents they file with the VDEQ carefully to ensure that no Confidential Business Information is unnecessarily included.

10. When Confidential Business Information is disclosed to the VDEQ, what must a company do to keep it from being disclosed to the public?

To keep Confidential Business Information from being publicly disclosed, a company should always accompany any document submitted to the VDEQ that contains Confidential Business Information with a confidentiality claim. This confidentiality claim will be certified by a representative of the company and will outline the basic reasons as to why the information qualifies as Confidential Business Information. In the case that a submission is covered by previous confidentiality claim(s), reference may be made to such existing claim(s). In this way a company could submit an initial confidentiality claim or an "evergreen claim" that could list the types of Confidential Business Information that will be submitted time and time again.

In addition, the reporting company should submit two copies of all filed documents - a copy to be sent to any citizen requesting information under the VFOIA and a confidential copy for the VDEQ's use only. The public copy should, of course, have all Confidential Business Information redacted or deleted. The two copies should also be clearly marked as either public or confidential to facilitate the VDEQ's proper filing of the documents. If the two copies are not properly marked, the confidential copy may inadvertently be placed into the public files.

11. Is there any practical difference between classifying information as a trade secret or as some other type of Confidential Business Information?

Yes. Disclosure of a trade secret can, under Virginia law, give rise to a private right of action against the party that wrongfully discloses the trade secret. Such remedies are not available for wrongful disclosures of other types of Confidential Business Information.

Thus, any time the information qualifies as a trade secret, a business should classify it as such in its confidentiality claim. Otherwise it may waive its ability to subsequently assert trade secret status if a wrongful disclosure is subsequently made because it may be deemed to have not taken reasonable steps to protect the information.

12. How will the VDEQ decide whether the information qualifies as Confidential Business Information?

The VDEQ currently uses a four-part test to determine whether submitted information qualifies for the Confidential Business Information exception to the VFOIA. First, the information must be subject to reasonable efforts to protect its confidentiality in the normal course of the company's business. Second, the information must not be obtainable from the company without the owner's consent other than through discovery in a judicial proceeding. Third, the information must not be publicly available. Finally, disclosure of the information would cause substantial harm to the owner of the information. All four criteria must be met for the information to qualify as Confidential Business Information.

13. What are some examples of types of information for which a company may make a legitimate confidentiality claim?

In the past, the VDEQ has protected the following types of information: (i) confidential process descriptions, (ii) maximum rated capacities, (iii) operating parameters, (iv) production information, (v) the manufacturers and model numbers of equipment used in production, (vi) throughput limitations, (vii) process feed limitations, and (viii) production rate limitations. This list is not exclusive, however, so other types of information may also be protectable.

14. What procedures will the VDEQ take upon the submission of Confidential Business Information?

When Confidential Business Information is claimed and the reporting company provides two copies of the document as outlined above, the VDEQ will place the confidential copy into a file that is physically separate from the publicly accessible files. The confidential copy will only be available to VDEQ employees who, in the course of their duties, have a reasonable need to access the confidential document. Under no circumstances will the public have access to the confidential files.

These confidential files will also be subject to reasonable security measures. Any employee of the VDEQ who has need of a confidential file will be required to sign the file out. That employee must then keep the confidential file in his or her possession until it is returned and checked back in. The VDEQ will have at least one employee whose duties shall include the enforcement of these rules and the safekeeping and tracking of all confidential files.

In addition, the VDEQ will send a copy of every internal memorandum or other document it generates using a confidential file to the company whose confidential file it used. Reporting companies will, thereby, be enabled to monitor the VDEQ's use of its confidential information. From time to time, a reporting company may even want to make a blanket request under the VFOIA for all VDEQ documents even mentioning the company so that compliance with these measures may be monitored.

Finally, as outlined under Question #15, the VDEQ will provide the reporting company with notice any time information that was subject to a confidentiality claim is requested.

15. What procedures will the VDEQ take upon receipt of a request for Confidential Business Information?

Soon after you file information with the VDEQ under a confidentiality claim, the VDEQ will review your claim and make an initial determination as to whether you may properly claim Confidential Business Information treatment for each piece of information covered by the confidentiality claim. You will be notified of this determination in writing. As such, you should know long before any request is made whether the VDEQ will disclose your information to requesters under the VFOIA.

In addition, should your Confidential Business Information be requested, you will be notified of the request. If the VDEQ re-evaluates your confidentiality claim and determines that the information does not fall within the Confidential Business Information exception, it will immediately notify you so that determination may be contested in court. Thus, a company is guaranteed that its Confidential Business Information will not be made public at least until the company has been given notice and ample opportunity to prevent the disclosure by timely filing an injunctive suit.

Of course, even if a VDEQ decision is contested, it is always possible that a court may determine that some information does not properly qualify as Confidential Business Information, in which case the information will ultimately be disclosed to a party requesting the information. To minimize the likelihood of such a determination, it is important to carefully evaluate whether Confidential Business Information treatment will be available for a specific piece of information before making a confidentiality claim.

16. What other steps should a company take to protect its Confidential Business Information?

In addition to making a confidentiality claim every time it submits confidential information, a company should undertake audits of its file with the VDEQ to assure that no confidential information has been inadvertently placed in the public file. The VDEQ receives large quantities of filings from regulated companies and from time to time may inadvertently misfile some of the documents. It is never a good idea to simply rely upon the VDEQ to file

information properly, especially if the information involved is very sensitive or valuable to your company.

Internal memoranda also frequently incorporate confidential information supplied by reporting companies, which memoranda may then be placed mistakenly in the public file at the VDEQ or even the files of other agencies to which the memorandum was circulated. Again, auditing a company's file with the VDEQ and other agencies can ensure that information contained in internal memoranda is not accessible to the public.

17. Can a business challenge the VDEQ's determination that certain information does not qualify as Confidential Business Information?

Yes. All VDEQ determinations regarding Confidential Business Information may be reviewed by a court of law in the Commonwealth of Virginia. Because a reporting company will receive notice before any of its information subject to a confidentiality claim is made public, it will always have the opportunity to challenge any VDEQ determination to disclose that information by seeking injunctive relief from the courts.

Frequently Asked Questions By Persons Requesting Information under the VFOIA:

18. Who may request information under the VFOIA?

The VFOIA is applicable to all "citizens of the Commonwealth," representatives of newspapers and magazines with circulation in Virginia, and representatives of radio and television stations broadcasting in Virginia (collectively, "Eligible Requesters"). These last two categories of individuals may request information whether they are residents of Virginia or not.

The Eligible Requester's intentions in requesting the information are immaterial to whether that citizen is entitled to receive the information. There is no requirement that the Eligible Requester's intentions conform to the underlying purpose of the VFOIA, *i.e.* to allow citizens to better monitor their government. Thus, an Eligible Requester may request information that was filed by a rival business solely to discover some economically valuable information.

19. What information are Eligible Requesters entitled to receive?

Eligible Requesters may request and receive all information in the records of public bodies except that information that is subject to an exception under the VFOIA. Thus, for example, Eligible Requesters do not have access to Confidential Business Information.

Under no circumstances, however, shall any Eligible Requester be denied the right to see emissions data filed with the VDEQ. Emissions data can never be classified as Confidential Business Information.

20. How can an Eligible Requester make a request under the VFOIA?

A request can be made under the VFOIA by simply contacting the VDEQ by telephone, letter, or otherwise, and identifying which records are being requested with reasonable specificity. The Eligible Requester may be charged reasonable administrative and copying fees.

21. How long will it take to process the request?

The Eligible Requester should, within five working days, receive either the information requested or some explanation as to why some or all of the information will not be disclosed.

22. Why are some portions of the requested documents blank and/or blacked out?

Some types of information are excluded from the disclosure requirements of the VFOIA. Thus, for instance, Confidential Business Information will be deleted or redacted from the

publicly disclosed documents. The publicly available document, then, contains all information that was submitted to the VDEQ that is not subject to the Confidential Business Information exclusion or any other exclusion to the VFOIA.

If the omitted information is important to measure compliance with environmental laws, a surrogate parameter (discussed below in Question #28) may be used to allow concerned citizens to monitor enforcement while protecting the Confidential Business Information.

23. May an Eligible Requester challenge the VDEQ's determination that certain information qualifies as Confidential Business Information?

Yes. Determinations by the VDEQ under the VFOIA are always reviewable by a court of law in the Commonwealth of Virginia. An Eligible Requester seeking information may petition for a writ of mandamus or file suit seeking injunctive relief to force the VDEQ representative to disclose the requested information.

An Eligible Requester may only force the VDEQ to disclose information that he, she, or it has a right to receive, though. Thus, if the blank section did contain information that was properly classified as Confidential Business Information, the Eligible Requester will be unable to gain access to it, even through legal action.

Frequently Asked Questions by VDEQ Employees Responding to Requests for Information or Confidentiality Claims:

24. How have the Courts interpreted the public disclosure provisions of the air laws?

To date, the courts of Virginia have not ruled specifically on any issues related to the exclusions under the VFOIA as applied to disclosures made under the Clean Air Laws. The courts have, however, repeatedly upheld public bodies' rights to withhold information from public disclosure if it is properly within an exception to the VFOIA.

25. Does the VDEQ need to conform its FOIA policy to the Uniform Trade Secrets Act ?

Yes. In practice, the VDEQ already does conform to the Uniform Trade Secrets Act. On the Form 805 Title V Air Operating Permit Application, the VDEQ defines trade secrets using the Uniform Trade Secrets definition and states that trade secrets will not be disclosed under the VFOIA. By following the procedures outlined in the answers to Questions 26 through 29, the VDEQ should be able to prevent the inadvertent disclosure of any trade secrets and thereby comply fully with the requirements of the Uniform Trade Secrets Act.

26. What is the procedure when a confidentiality claim is received?

When a confidentiality claim is made in a Title V Application or any other submission of information to the VDEQ, the VDEQ should immediately review the confidentiality claim to determine if the information is properly within the scope of the Confidential Business Information exception. In particular, the VDEQ should review the information to ensure that none of the claimed information qualifies as "emissions data" as that term is defined and described in the applicable Virginia statutes, regulations and policies.

Following the review of the confidentiality claim, the reporting company should be notified in writing of the VDEQ's decisions. If any confidentiality claims are denied, the reporting company should be given the opportunity to respond and offer further explanation as to why that information qualifies as Confidential Business Information. If, after submission of further explanation, the VDEQ continues to reject the claim, the VDEQ should again notify the business in writing so that the business may seek judicial review if it so desires.

27. What is the procedure when information subject to a confidentiality claim is requested under the VFOIA?

When information subject to a confidentiality claim is requested, the VDEQ will immediately notify the company that submitted the information at issue. The VDEQ may, in its discretion, re-evaluate the confidentiality claim. If the VDEQ decides not to revisit the earlier

determination or again determines that the information properly qualifies as Confidential Business Information, the requester must be notified that the information requested will not be disclosed and the reasons for the VDEQ's refusal.

If the VDEQ should reverse its earlier decision and hold that the information is not properly within the scope of Confidential Business Information, then the reporting company should be immediately notified and the VDEQ should delay disclosure of the information as long as possible under the VFOIA to give the reporting company opportunity to seek an injunction.

28. How might the mutually desirable goals of appropriate public disclosure and protection of legitimate trade secrets be accommodated?

Often times, it is possible to supply Eligible Requesters with data necessary for adequate monitoring while protecting Confidential Business Information by using "surrogate parameters." These surrogate parameters will use "Units" in place of standard measurements such that emissions compliance may be calculated, while making the underlying Confidential Business Information indecipherable from the public document without knowledge of how to convert the "Units" into standard units of measurement. Any conversion ratios or formulas used would, of course, be available to VDEQ employees only and otherwise kept confidential.

29. What should we do if the EPA requests Confidential Business Information about a reporting company from us?

Consistent with its instructions in Form 805, the VDEQ will comply with all requests for information from the EPA. If the EPA should request information for which a confidentiality claim has been made by the reporting company, however, **the VDEQ will, itself, make a confidentiality claim when submitting the information to the EPA, thereby obtaining confidential treatment under the federal Freedom of Information Act for the company.** In addition, VDEQ will notify or consult with the applicant /permittee before sending any Confidential Business Information to EPA in order to assure that the appropriate justification is provided for all Confidential Business Information for which protection from public disclosure is provided under the federal FOIA.

ATTACHMENT C

Recommendations for the Collection and Management of Confidential Business Information

The VDEQ receives a variety of information from regulated facilities through the process of permitting these facilities and in determining compliance of these facilities with their permits. In certain cases, the regulated facility considers information it provides to the VDEQ to be "confidential business information" (CBI). It is necessary for the VDEQ to collect and manage CBI in such a way as to prevent its inadvertent release to the public. This attachment has been prepared to address the issues involved in protecting CBI on file at the VDEQ. This is a significant responsibility of the VDEQ in that the inadvertent release of CBI may cause financial and competitive loss to the regulated facility.

Our primary recommendation is that the VDEQ should provide at least as much protection for CBI as the companies which provide the CBI to the VDEQ. In order to assess the measures necessary to adequately protect CBI, it is further recommended that Virginia State Air Pollution Control Board convene a special task force consisting of representatives of Virginia industry, VDEQ staff and the Attorney General's office to assess the necessary elements of a management system for protecting CBI contained in VDEQ files.

The subcommittee has identified three major areas of concern. First, all CBI provided to the VDEQ by the regulated source and all other CBI pertaining to the facility must be stored in locked files separate from the public information. Access to the CBI must be controlled with provisions for tracking CBI documents and those who have accessed them.

Secondly, the subcommittee recognizes that internal documents in the form of correspondence, analyses, and compliance assessments may be generated which could contain CBI. This is a much more difficult problem. If it is possible that these documents could contain CBI, they must be screened for CBI before being placed in the public file.

Finally, special concerns exist for CBI contained in electronic format. In practice, considerable information on regulated facilities is now contained in electronic format. Identifying electronic files containing CBI and protecting them from inadvertent public release require special management procedures.